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PUBLIC POLICY, THE CONSTITUTION, AND THE SUPREME COURT

*Philip B. Kurland**

I trust that you will pardon a few personal notes by way of introduction to what I have to say this evening, not so much by way of apologia, as to indicate where I am going by telling you from whence I come. First, however, I would remind you that this is an essay and an essay, as Felix Frankfurter once told us, "is tentative, reflective, suggestive, contradictory, and incomplete. It mirrors the perversities and complexities of life."¹ Unfortunately, academic lawyers, unlike scientists, never have the satisfaction of proving their theses to be right, although they can be proved to be wrong. In my dotage, as you will note in the text that follows, I have taken to quoting Oliver Wendell Holmes more and more often, for, like my parents, he has proved to grow wiser as I have become older. Among his insights that have proved themselves to me is his warning not to confuse the obvious with the necessary or certitude with certainty.² And so I claim no grasp on Truth. I aspire only to an honest effort to reason from questionable premises to dubious conclusions.

I confess the dreadful fact that I am only a lawyer, a lawyer who teaches and not a scholar whose discipline is law, not a practitioner, and certainly not a statesman. I learned my law in an old-fashioned school, by which I do not mean Harvard. I mean that

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1. Frankfurter, *The Paradoxes of Legal Science*, in FELIX FRANKFURTER ON THE SUPREME COURT 203 (P. Kurland ed. 1970).

2. O.W. HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 311 (1920).

my mentors, from whom I learned an attitude toward constitutional law more than its content, were Thomas Reed Powell, Learned Hand, and Felix Frankfurter, themselves students in the same way of Oliver Wendell Holmes. Although I am a graduate of the Harvard Law School, I am not a follower of the sect of Luddites now ensconced there. Although I am a member of the University of Chicago faculty, I claim no kinship with the economic school of jurisprudence in fashion there now. I find the Chicago School to be heartless and the Harvard School to be mindless. Both seem to discount the importance of the individual and individuality in our conception of a free and responsible democratic government.

Professor Paul Freund once began a lecture on Mr. Justice Brandeis in this fashion:

A critic as unperceptive as he was unfriendly once remarked that Charles Evans Hughes possessed one of the finest minds of the eighteenth century. A more plausible observer might maintain that Louis D. Brandeis had one of the finest minds of the nineteenth century. It is certain that most of the central features of the twentieth century were antipathetic to his view of man and man's potentialities.³

I think of myself as the critic did of Hughes or perhaps as Freund did of Brandeis. I find the problems of the mass urbanized society in which the individual is subordinated to the class to which he belongs or is assigned highly uncongenial. Except for modern plumbing and sanitation, and the electric light, I cannot think that much real progress has been made over the recent centuries. Indeed, I am so antediluvian as to be unable to use a word processor or to understand any computer more complex than an abacus. You are warned then that I may very well be viewing my subject through the wrong end of the telescope.

Let me begin then by attempting to speak of the Constitution itself as an expression of public policy. Just as with law, I am informed, public policy may be divided into the two categories of the substantive and the procedural.⁴ And when one looks at the text of the Constitution, it is readily apparent that the public policy expressed in it is essentially procedural rather than substantive.

3. P.A. FREUND, *Mr. Justice Brandeis*, in MR. JUSTICE 177 (A. Dunham & P. Kurland eds. 1956).

4. Freman, *Public Policy*, 23 INT'L ENCYCL. SOC. SCI. 204 (1969).

In effect, it assigns or allocates the functions of making substantive public policy to different parts of government and specifies the manner in which that policy must be made if it is to be legitimate. It does not, generally, say what the substantive policy thus created should be.

It is also evident from the text that the lion's share of the substantive policy-making function in the national government was assigned to the legislative branch, largely by article I, § 8, although provision was made for recommendations to the legislature by the President in article II. There is no suggestion of a policy-making function for the judicial branch at all. Generally, the substantive policy is left to be made by a branch of government authorized to do so by the Constitution. If it says who shall make the rules and how they should be made, it does not ordinarily say what those rules should be.

Except to a seventeenth- or eighteenth-century mind, this may come as a surprise. We now have in excess of four hundred and sixty volumes of United States Supreme Court Reports which are full to bursting with substantive constitutional commands. But, for the most part, these are inventions or concoctions of the Supreme Court rather than commands of the Constitution. I do not mean to quibble. I know that there are ambiguities and interstices in the constitutional text which have to be resolved by some authority and the Supreme Court is perhaps as good an agency as any to charge with this function. But it is one thing to fill a gap that the founders left and another to make it. It is one thing to resolve an ambiguity and still another to create an ambiguity in order to resolve it. My revered master, revered by a few of us at least, Mr. Justice Frankfurter, found Justice Marshall's dictum in *M'Culloch v. Maryland*, that "it is a *constitution* we are expounding,"⁵ "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending."⁶ When a great mind like Marshall's communicates with another great mind like Frankfurter's, the communication may be charged with meaning that it is not given to ordinary mortals to comprehend. While I fully understand that a constitution is not to be construed as a contract, or even as a statute, because of its

5. 17 U.S. (4 Wheat.) 316, 407 (1819).

6. Frankfurter, *supra* note 1, *John Marshall and the Judicial Function*, at 534.

function as a limit on government, Marshall's proposition has come to signify that the words of the Constitution may be freely deconstructed to suit the desires of the interpreter. Thus, Marshall's words may, indeed, be the most important of all judicial dicta on the Constitution, but if so they are also the most destructive of the notion of the Constitution as a limitation on governmental authority. And surely the founders thought that they were creating a national government of limited powers, limited by constitutional provisions, in order to assure the liberty of the people. It will be remembered that in *M'Culloch*, Marshall's opinion read the words "necessary and proper" to mean not required and authorized but only reasonable and relevant,⁷ i.e., necessary = reasonable, proper = relevant: a more potent formula than $E = mc^2$. All this rested on Marshall's idea that it would be illogical to establish a great nation with limited powers, although that is exactly what the creators had in mind in 1787.

That the enforcement of the procedural public policy expressed in the Constitution was left to the judiciary by way of the power of judicial review is, I think, a valid assumption both from legislative history and the structure of the instrument. That is what Justice Marshall held in *Marbury v. Madison*.⁸ And that is all that he held in *Marbury*, however much the Court likes to quote his more expansive dicta: "It is emphatically the province and duty of the judicial department to say what the law is."⁹ The Court has, however, taken it upon itself to convert some of the clearly procedural policy of the Constitution into a license to itself to write substantive constitutional rules at will. The most egregious examples of this transmutation are to be found in the Court's readings of the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the fourteenth.

There is no suggestion in the origins of these provisions that they had substantive rather than procedural meaning. In effect they were restatements of what our English cousins have come to call "the rule of law." Rules of substantive public policy were not to be arbitrarily imposed but were to be created only through

7. 17 U.S. (4 Wheat) at 323-25.

8. 5 U.S. (1 Cranch) 137 (1803).

9. *Id.* at 177.

observation of long-established legislative or judicial processes. Indeed, many of the elements of due process are specifically enunciated in article I, §§ 9, 10, and in the Bill of Rights. Moreover, as the equal protection clause says, the same substantive rules were to be applied to all persons within the jurisdiction. No one was to be above the law, none to be below it. But that is not the way the Justices have read these provisions.

Nor were they alone. For example, listen to Professor Felix Frankfurter, as he then was, writing in *The New Republic* in 1924:

[T]hese broad "guarantees" in favor of the individual are expressed in words so undefined, either by their intrinsic meaning, or by history, or by tradition that they leave the individual Justice free, if indeed they do not actually compel him, to fill in the vacuum with his own controlling notions of economic, social, and industrial facts with reference to which they were invoked. These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of the different justices.¹⁰

I am always tempted to substitute: "These judicial judgments are thus bound to be determined by the experience, the environment, the fears, the imagination of a majority of nine wilful men who would make themselves—indeed, have made themselves—the prime policy-makers of the national government, at least, in domestic affairs." I do not gainsay the accuracy of the Frankfurter description of the judicial process under the fifth and fourteenth amendments. I merely decry it.

I should much prefer the Holmesian proposition:

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.¹¹

Let you not misunderstand me or, of more importance, do not misunderstand Mr. Justice Holmes. None knew better than he that judicial judgments, and certainly those that changed existing rules were, in fact, expressions of public policy. His opinions and his

10. Frankfurter *supra* note 1, *The Red Terror of Judicial Reform*, at 163.

11. *Tyson & Bros. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

writings are replete with acknowledgments of the role of policy-making in the judicial function. Thus, he wrote, while still on the Supreme Judicial Court of Massachusetts:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.¹²

To say that the judicial process at times is, like the legislative process, simply a process of formulation of public policy, however, does not acknowledge the limited area in which the judiciary is charged with making substantive policy. Within the realm of the common law, in the absence of Constitution and statute, Holmes noted, "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."¹³ That is a far different notion from the conception of the judicial function assumed by the Supreme Court under the due process clauses and the equal protection clause.

Indeed, at the common law—and the common law is the rock on which the Constitution was erected—it was long recognized that the making of substantive public policy is primarily a legislative and not a judicial function. Baron Parke, in the House of Lords, put the classic attitude in these terms:

It is the province of the statesman and not of the lawyer to discuss and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the written and unwritten law. Public policy is a proper ground for a decision only in the sense of the the policy of the law, not in the sense of mere judicial notions as to what is best for the public good.¹⁴

12. *Vegeahn v. Gunther*, 167 Mass. 92, 106, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting).

13. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting).

14. *Egerton v. Brownlow*, H.L. Cas. 1, 123, 10 Eng. Rep. 359 (1853).

Let me invoke a more contemporary and less alien voice to the same end. I refer here to Robert H. Jackson, whose book, *The Struggle for Judicial Supremacy*, was published almost simultaneously with his appointment as a Justice of the Supreme Court in 1941. In a chapter entitled "Government by Lawsuit," he wrote:

Judicial justice is well adapted to ensure that established legislative rules are fairly and equitably applied to individual cases. But it is inherently ill-suited, and never can be suited, to devising or enacting rules of general social policy.

. . . Custom decrees that the Supreme Court shall be composed only of lawyers, though the Constitution does not say so. . . . Thus government by lawsuit leads to a final decision guided by the learning and limited by the understanding of a single profession—the law.

It is no condemnation of that profession to doubt its capacity to furnish single-handed the rounded and comprehensive wisdom to govern all society.

. . . In stressing this I do not join those who seek to deflate the whole judicial process. It is precisely because I value the role that the judiciary performs in the peaceful ordering of our society that I deprecate the ill-starred adventures of the judiciary that have recurrently jeopardized its essential usefulness.

Nor am I unmindful of the hard-won heritage of an independent judiciary which for over two hundred years has maintained the "rule of law" in England, the living principle that not even the king is above the law. But again, the rule of law is in unsafe hands when courts cease to function as courts and become organs for control of policy.¹⁵

Of course, all this was said before our law schools began to be taught by the Leonardo da Vincis who have mastered all knowledge and who turn out students of such wisdom and omniscience that, on graduation, they can be relied upon to produce Supreme Court opinions and establish our fundamental social policies.

Supreme Court opinions—as I tell my undergraduate students—(I need not tell my law students because they already know everything when they arrive) are made up, in varying proportions, of four elements, in addition to the statement of facts which may or may not resemble those in the record. First, there are the *propositions* or *principles* allegedly derived from constitutional or statutory language; second, judicial *precedents* which, these days,

15. R. H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 288, 301, 321-23 (1941).

are more likely to refer to lengthy obiter dicta rather than holdings in previous cases; third, the *practicalities* of the situation which license or inhibit the scope of judicial adventurism; and finally, and not least, the *personal predilections* of each of the judges, for it must be understood that, in Hamiltonian terms, the judiciary now exerts WILL as well as JUDGMENT if not yet FORCE.¹⁶ Each of the four elements, separately or in combination, may be subsumed under the rubric of public policy. So, too, may the opinions reflect attitudes of the press, whether in the news columns or on the editorial pages as when the Court turned turtle in the so-called "released time cases"¹⁷ and when the Court resorted to what it called "public policy" to decide the recent *Bob Jones*¹⁸ tax exemption for racially segregatory religious school case. Of course, the personal predilections of the Justices and the pressures of the press are dealt with only sub silentio in the Court's opinions. Most often, the opinions, both majority and minority, claim to be compelled by constitutional or statutory language and judicial precedents.

The only point I am making here is that the Court has little to rely on in the Constitution itself as a basis for its substantive policy-making decisions under the due process and equal protection clauses. As Mr. Justice Holmes wrote to Frederick Pollock as long ago as 1924: "The 14th Amendment is a roguish thing."¹⁹ There is, however, much in the Constitution to legitimate the Court's policy-making in procedural areas, especially those marked by the fourth through the eighth amendments and sections 9 and 10 of article I. It should be noted, moreover, that with regard to civil and criminal procedure, the Court operates in fields in which judges and lawyers may legitimately claim both the necessary experience and expertise on which to base its judgments. So, too, the allocation of policy-making powers among the branches of government and the specific limitations can be found in the constitutional text. And, while it would be logical for each branch of government to decide for itself which powers of policy-making were allotted to it by the Constitution, the founding fathers did speak in the conventions, both originating and ratifying, as if the courts

16. THE FEDERALIST No. 78 (A. Hamilton).

17. *Zorach v. Clausen*, 343 U.S. 306 (1952).

18. *Bob Jones University v. Allen*, 461 U.S. 574 (1983).

19. 2 HOLMES-POLLOCK LETTERS 137 (M. Howe ed. 1942).

would have the power of judicial review specifically to cabin each branch within its constitutional limits, lest each arrogate to itself more than its entitlement. Thus, while it is not properly the Court's role to substitute its judgment on the merits of public policy for those of the elected branches, it has been the accepted judicial task to determine when one of them has exceeded its authority.

You may have noted an ellipsis in my remarks about the public policy framed by the Constitution itself, for I have made no mention of the first amendment, one of the more important expressions of substantive policies. The problem here is not so much whether the Constitution establishes a substantive rule, but what that substantive rule is. And here we get into the very deep waters of whether the framers' intent or contemporary conception is to have priority of place. For reasons I cannot expand on now, I think it fairly clear that the written document intended only to ban prior restraint on speech and press, as Blackstone had pronounced, and that the religion clauses endorsed the views of Jefferson and Madison rather than Roger Williams. The real difficulty now derives from the fact that the original purpose was only to limit the national government and not the states. When it was discovered in the twentieth century that the first amendment was, indeed, incorporated part and parcel into the fourteenth, and thus applicable to the states, there was no way to read it in terms of what its authors contemplated. What license this should have created for the Court is hard to say, but the Court has followed its own fancy in the application of the first amendment. And as Dr. Samuel Johnson once put it: "All power of fancy over reason is a degree of insanity."²⁰

So much for the public policy made by the Constitution itself. It created a structure of government not a code of governance. The structure was to be self-regulating, largely through the check by frequent popular elections. The Court was not envisioned as, in Learned Hand's terms, a group of Platonic Guardians to supply the ultimate wisdom if and when the other branches failed.²¹ But all that I have said is based on the notions held only by troglodytes these days, that we are governed by the Constitution, as it was

20. S. JOHNSON, *RASSELAS* XLIV (1759).

21. L. HAND, *THE BILL OF RIGHTS* 73 (1964).

composed by the 1787 Convention and in the amendments thereto, rather than by constitutional law which is a product of the cerebrations of the Justices of the Supreme Court. You should note that even that keen "eighteenth-century mind," Charles Evans Hughes, reported as early as 1908: "We are under a Constitution; but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution."²² Perhaps the "eighteenth-century" aspect of his statement is to be found in his reference to the Court as a guardian of property rights as well as liberty.

There is, however, another view of public policy that has to be considered. This is public policy not in the sense of the rules of governance for our society but public policy as the ambience within which those rules are to be made, what Mr. Justice Holmes called, in a different context, "a brooding omnipresence in the sky,"²³ and what an earlier generation might have referred to as the *Zeitgeist*, which The Oxford English Dictionary defines as "the spirit or genius which marks the thought or feeling of a period or age."²⁴

There was such an ambience that surrounded the origins of the Constitution. It may be expressed in terms of the end of monarchy and autocracy and the beginning of responsible, representative democracy. There was to be no privilege or prerogative for peers, prelates, or princes. The governors of the people were to be selected by the people, to come from the people, and to return to the people, preferably after short terms of office. All to the end that government not be tyrannical, wilful, or arbitrary. The power of each branch was to be severely cabined by an elaborate system of checks and balances of each branch of government by the others as well as by the people. The national government was to be one of limited, delegated powers, sharing sovereignty with the states. Strong state power was thought to be of the essence of freedom of the people. In a way, the original *Zeitgeist* was to be found in the spirit of the Declaration of Independence, which has remained a shadowy background to, if not a part of, constitutional rule.

If, however, there has been one consistent theme that has dominated the development of constitutional law, and not least of

22. L.M. PUSEY, CHARLES EVANS HUGHES 204 (1951).

23. Southern Pacific Co. v. Jensen, 244 U.S. at 222.

24. THE OXFORD ENGLISH DICTIONARY v. XII, 88 (1933 & photo. reprint 1970).

Supreme Court adjudication, throughout history, it has been the persistent devotion to centralization of all government power. There can be no doubt that what the constitution writers created was a federalism. Protest as you will, however, and as politicians do, federalism is now totally gone from the American constitutional structure. There are today no governmental powers that can be exercised by state government except under the authorization or with the acquiescence of the national government. Surely today state government is only a reminder of our earlier Constitution, "just as," to use a Holmesian metaphor, "the clavicle in the cat only tells of the existence of some earlier creature to which a collar bone was useful."²⁵ Oh, there are remnants of state sovereignty: each state has two representatives in the Senate and the electoral college continues as an all but useless function in terms of states. But in fact, we are no less a unitary government than France or Japan. Administrative functions are left to the states and there are some who would like to return some national burdens if not national income to them. Policy-making is, however, in Washington, D.C., and it is exercised down to the lowest levels of the police power, even with regard to maximum highway speed and minimum drinking age. And, while the Court has been the effective means of bringing this result about, it should be remembered that the Court did not thrust power on the national government, it only legitimated it. But legitimate it, it did.

I do not mean to tell you that ancient battles are not still rehearsed from time to time in the Supreme Court. In some manner or other Mr. Justice Rehnquist persuaded his brethren to bow in favor of state exemption from compliance with federal wage and hour regulations for its own employees in *National League of Cities v. Usury*²⁶ on the theory that there was meaning in the tenth amendment. But what was hailed as a watershed proved no more than a hillock. The 1976 decision was overruled in another five to four decision by the Court on February 19, 1985.²⁷ Mr. Justice Blackmun changed his mind. "Equal Justice under Law" reads the facade of the Supreme Court building, but its true motto should be "e pluribus unum."

25. O.W. HOLMES, BOOK NOTES AND UNCOLLECTED LETTERS 9 (1936).

26. 426 U.S. 833 (1976).

27. *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913, N.Y. TIMES, Feb. 20, 1985, at Sec. A13, col. 3 (U.S. Sp. Ct. Feb. 19, 1985); Cf. *EEOC v. Wyoming*, 460 U.S. 226 (1983).

No doubt most students who are, these days, taught no American history would be surprised to learn that the members of the federal and state conventions of 1787-88 fought heatedly over the question whether provision should be made for any area where no state would be sovereign and where a national capital could be established. There was strong objection to exclusive jurisdiction for the national government over any territory within the United States. For, to them, the absence of state government meant the absence of liberty. There was also a great fear that a national capital would mean a national court in the sense of a Versailles, where the inhabitants would be totally aloof from the people and where government would exist only to benefit the courtiers. I wonder whether, if these disputants of 1787-88 could return for a visit to Washington, D.C. today, they would realize their fears about a national capital leeching on the vitals of American society had been baseless.

The principal judicial means for nationalization was the persistent reconstruction of the commerce clause, first, by expanding the meaning of commerce and then by expanding the meaning of interstate commerce, and finally by including all local commerce if it could be said to affect or compete with interstate commerce—as it always could. So far as substantive public policy is concerned, it would now be possible for the national government to enact most of its laws under the Supreme Court's version of the commerce clause. And the negation of the reserved powers of the states was pretty well marked by the legitimation of the grant-in-aid as means of formulating state policy. The sixteenth amendment had created the deep pocket that Uncle Sam could use to bribe states to bring their public policies in line with the desires of the central government. In 1923, in an opinion by the arch-conservative Mr. Justice Sutherland, the extortion implicit in grants-in-aid was validated as not contravening the tenth amendment.²⁸ The ultimate primacy of the nation over the states is not a recent innovation of our judicial Constitution makers.

No other doctrine has brooded so omnipresently over the Court as its commitment to nationalization, whatever the Constitution might say or its authors may have intended. But there have been equally strong policies also more influential on Supreme Court decisions than the mere words of the basic document. Consider the

28. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

notion of laissez-faire which together with social Darwinism provided the *Zeitgeist* for the late nineteenth and early twentieth centuries. The label "freedom of contract" was invoked in substitution for the words of the Constitution. The zenith of laissez-faire public policy was probably reached in *Lochner v. New York*,²⁹ where the Court struck down, by a vote of five to four, a state law setting a maximum ten-hour day and sixty-hour week for bakery workers.

It was in this case that Mr. Justice Holmes uttered what may be his most famous dissent:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with the theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think injudicious or if you like as tyrannical as this, and which equally interfere with liberty of contract. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.³⁰

The fact is that Holmes was wrong. As of 1905, the Constitution did embody Mr. Herbert Spencer's *Social Statics*, just as surely as if it had been included *in haec verba* in the terms of the document. That was the public policy of the day that was a higher law than the Constitution. And, perhaps it will give many of you some comfort to realize that many of the academics recently appointed to the federal appellate courts by President Reagan—at least some of whom stand in line for promotion to the high court, with or without Reverend Falwell's approval—would think that a renaissance of *Lochner* would not be a bad thing. For them, the overriding public policy is to be found in Adam Smith's *Wealth of Nations*. Indeed, much of our history seems to show an oscillation between an overriding belief that wealth is virtue and poverty is sin and its opposite that wealth is sin and poverty is virtue.

29. 198 U.S. 45 (1905).

30. 198 U.S. at 75 (Holmes, J., dissenting).

In any event, so far as laissez-faire in the realm of economic regulation is concerned, it died a resounding death with the Great Depression. What its phoenix-like qualities may be remains to be seen.³¹

If, however, Supreme Court intolerance of economic regulation is to be reversed, it is going to take some doing. Modern Supreme Courts do nothing by halves and, with a single major exception that was later overruled,³² the Warren and Burger Courts' scutcheons remain unblotted by any case in which economic regulations have been invalidated as violative of the due process or equal protection clauses. At the moment, it would seem that, however arbitrary the economic regulation, it does not violate the Constitution.

Since the demise of economic due process, which followed the Roosevelt Court-packing plan, no equivalently broad jurisprudential spirit has hovered over the judicial policy-making function. The Stone Court was prone to favor labor unions, but that was in accord with the directions of Congress. It showed greater concern for some rights of criminal defendants, especially with regard to coerced confessions, while revealing the usual ambivalence toward the fourth amendment's search and seizure provisions, an ambivalence that has persisted to this day. The equal protection clause remained largely the last resort of desperate litigants. The war powers of both the President and the Congress were exalted, especially while the war was being waged, but even afterwards. (Perhaps the Court had learned a practical lesson from the inept attempts of the Civil War Court to limit Lincoln's war powers.) The concept of the developing welfare state was defended. The rights of aliens suffered in a xenophobic atmosphere. The Cold War tested the limits of freedom of political speech. Unpopular religious minorities were afforded protection and a strict notion of separation of church and state was born.

On the whole, however, during both the Stone and Vinson Courts, the judiciary stayed in its basket. When it made public policy, it did so interstitially. It mostly paid due homage to the constitutional structure and congressional mandates. The nation no less

31. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

32. *Morey v. Doud*, 354 U.S. 457 (1957) overruled in *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976).

than the Court worried about the limits of tolerance for those ideologies against which we had done battle. To what degree should we afford freedom to those who, given the chance, would take that very freedom from us? To what degree was the threat to our polity and civility greater from domestic demagogues and bigots than from alien subversion?

The Court was regarded as liberal, if not radical, primarily because it sustained rather than thwarted the public policies of big government. In Clinton Rossiter's unfortunately accurate term, "constitutional dictatorship,"³³ marked by the expanded power of the executive and the bureaucracy at the expense of Congress was largely unchallenged by the judiciary, except for the landmark *Steel Seizure Case*,³⁴ in which a politically divided Court favored the powers of Congress over the claims of the President. That was probably the last victory for congressional power in any contest waged with the President in the courts.

The Court performed its tasks during the Stone-Vinson era more or less within the confines marked by the Constitution. Except for the persistent over-riding commitment to centralization of government authority, which has never disappeared, there seemed to be no higher law directing its conclusions. With the arrival of the Warren Court, or what could be called, ironically perhaps, the Eisenhower Court, after the President whose appointments included, in addition to the Chief Justice, Justices Brennan, Stewart, and Harlan, the Justices began to march to a new drumbeat. Egalitarianism replaced laissez-faire as the judicial *Zeitgeist* and with egalitarianism came the revival of the notion of judicial supremacy which was the essence of economic due process, but this time in an even more virulent form.

I do not propose here to rehearse even the names of the myriad of innovative, not to say revolutionary, decisions of the Warren and Burger Courts. They are all of sufficiently recent memory that the names of a few should suffice to refresh your recollection. *Brown v. Board of Education*,³⁵ of course, is probably the single most important decision of the Supreme Court since *M'Culloch v.*

33. C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

34. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

35. 347 U.S. 483 (1954).

Maryland, although its holding did not change the concept of the equal protection clause, that a state was required not to classify persons according to race. Indeed, *Brown* probably does not even deserve the accolade of spawning the equal protection clause revolution. Those laurels properly belong to a Vinson Court decision, *Shelley v. Kramer*,³⁶ which outlawed enforcement of racial restrictive covenants. But, as Alexander Bickel said, "*Brown v. Board of Education* was the beginning,"³⁷ and it was the beginning of the extensive doctrine of egalitarianism that coloured so much of the Supreme Court jurisprudence that followed in its wake. *Baker v. Carr*³⁸ insinuated the doctrine of "one-man, one-vote" (now "one-person, one vote") into a Constitution which had clearly left the question of legislative apportionment to state legislatures.

*Mapp v. Ohio*³⁹ began the conversion of the Supreme Court reports into the equivalent of a loose-leaf code of criminal procedure to be followed by both the state and federal courts. *Miranda v. Arizona*⁴⁰ marked a technique of enacting so-called prophylactic rules for police behavior, which made it irrelevant to any particular case whether the defendant had been harmed by police misfeasance.

Contrary to newspaper reports, the Burger Court has been largely an extension of the Warren Court both in its activism and its egalitarianism. Again, I would offer here just a few examples. But for a capacity to make constitutional bricks without any constitutional straws, certainly no prior case can be equaled by that of the abortion decisions.⁴¹ However much I like the results—and I do—I can find no justification for their promulgation as a constitutional judgment by the Supreme Court. So, too, the gutting of the elements of the common law jury has been without justification. The devotion to egalitarianism may be found not only in the Burger Court's extension of *Brown* far beyond its rationale, but in its treatment of the gender discrimination cases, and its favoring—if not always consistently—of expansive notions of affirmative action.

36. 334 U.S. 1 (1948).

37. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 7 (1970).

38. 369 U.S. 186 (1962). See Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252.

39. 367 U.S. 643 (1961).

40. 384 U.S. 436 (1966).

41. E.g., *Roe v. Wade*, 410 U.S. 113 (1973).

Surely, there have been places where the Burger Court has refused to expand Warren Court notions as its predecessor might have done. It refused to compel states to extend equal contributions to all students in all school districts.⁴² And some criminal procedure doctrines have not been carried to their logical conclusions. But, as Professor Vincent Blasi, who is anything but a conservative constitutionalist, wrote in his book entitled "The Burger Court, The Counter-Revolution That Wasn't": "the 1970s and early 1980s may well be looked upon as the period during which the activist approach to judicial review solidified its position in American judicial practice. . . . By almost any measure the Burger Court has been an activist court."⁴³

The problem with contemporary judicial activism is not, however, merely its rejection of legislative and administrative public policy because it conflicts with its own. It lies, rather, in the extension of authority from the power to negate legislative policy—the most that could be claimed for the constitutional authorization of judicial review—to a power to initiate and enforce the legislative policy that it creates. It can no longer be said that the judiciary is merely juridical in its power; it is now legislative and executive as well.

Courts not only ban racial segregation in schools, they administer school systems, subordinating all other educational values to the attempt to create racially proportional urban schools. They have not been very effective in achieving their goals, witness Washington, D.C., Philadelphia, Chicago, Boston, Atlanta, Los Angeles, etc., but not for lack of trying. They allocate and reallocate federal and state welfare funds. They no longer merely condemn overcrowded prisons, they undertake to manage them, with about the same success as they have had with the schools. They set priorities in expenditure of state budgets and determine which form of treatment is best for the mentally deranged or retarded. They impose punishments on litigants in civil suits without the requirement of legislative authorization or proof beyond a reasonable doubt. They bind persons by judgments who have never been parties to the lawsuits in which their rights are purportedly adjudicated. What the judges have not managed to do is to bring

42. *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

43. V. BLASI, *THE BURGER COURT, THE COUNTER-REVOLUTION THAT WASN'T* 198 (1983).

their own dockets under control by rapid and efficient disposition of cases.

The federal judiciary is exercising all the authority that the elected representatives in Congress have, although they are not representative of any constituency nor responsible to any. A legislator is chosen by, and removable by, his constituency. A federal judge chooses the constituency he wishes to represent and is, for all practical purposes, not removable at all.

There are many among us who have applauded this accretion of power by the judiciary. Some, like Judge J. Skelly Wright, reason from the "rightness" of the judicial actions to the validity of the judicial power.⁴⁴ Presumably, if the courts turn from their egalitarian bent, Judge Wright will no longer justify their authority to act. Some, like Professor Abram Chayes, find the expansion of judicial power justified by the necessity to control government by bureaucracy, which is no more democratic than are the courts.⁴⁵

A.A. Berle, of New Deal Brain Trust fame, reasoned that the expanded meaning of the equal protection clause requires the assumption of authority to enforce the new meaning. The egalitarian *Zeitgeist* is thus indissolubly linked with judicial activism. It was in 1969 that Berle wrote:

Ultimate legislative power within the United States has come to rest in the Supreme Court of the United States.

....

... The process by which a measure of legislative power devolved on the Supreme Court is interesting. It is the product of a mandate contained in the Fourteenth Amendment, multiplied by the forced intrusion of laws into fields of activity originally supposed to be outside statist action.

....

... The second stage of the revolution came when, faced with state "inaction," the federal courts assumed the task of filling the vacuum, remedying the failure. In plain English, this meant undertaking by decree to enact the rules that state legislation has failed to provide. The second phase was the really revolutionary development and, incidentally, set up the Supreme Court as a revolutionary committee.⁴⁶

44. See Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769 (1970).

45. Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

46. A. BERLE, POWER 345, 347, 350 (1969).

Berle worried, however, that the Court having lifted itself by its own bootstraps might, to change the metaphor, be hoist by its own petard. He acknowledges the problem is one of the Court as a "benevolent dictatorship," and his words are highly reminiscent of the classic argument of James Bradley Thayer⁴⁷ for judicial restraint:

Acquiescent acceptance of any benevolent dictatorship in time deadens the public to its responsibility for apprehending needs and dangers and demanding that their elected executives and legislators take appropriate measures. As John Stuart Mill observed, it compromises the future. Nonacceptance, on the other hand, piles up political pressures focused against the institution itself. Judicial legislation is not a substitute for political and legislative institutional processes. The will of the most enlightened Court is not the same as the will of the elected representatives of the people, and may cease to be the will of the people itself. Acceptance of its mandates based on respect for the Court is not the same as acceptance of active laws commanding popular assent after political debate.⁴⁸

My coda is simple and relatively short. I think that the Justices of the Supreme Court, like most officers of government, suffer from a chronic case of arrogance complicated by the bureaucratic watchwords, "the rules don't apply to me." The disease is endemic. It affects professors and lawyers, social and physical scientists, and, certainly candidates for public office, those who run them, and those who serve them. Unfortunately there appears to be no antitoxin. But, take heart. As Ralph Waldo Emerson once said: "These times of ours are serious and full of calamity, but all times are essentially the same."⁴⁹

The notion of the Supreme Court as the ultimate maker of policy in our democracy, as the savior of the nation's Constitution through its discretion to change it, is not a new one. For example, in 1906, Holmes wrote to Lord Pollock:

Brooks [Adams] at present is in a great stir and thinks a world crisis is at hand, for us among others, and that our Court may have a last word, as to who shall be the master in the great battle between the many and the few. I think this notion is greatly exaggerated and half-cracked.⁵⁰

47. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

48. A. BERLE, *supra* note 45, at 402.

49. R. EMERSON, UNCOLLECTED LECTURES 14 (1932).

50. 1 HOLMES-POLLOCK LETTERS, *supra* note 19, at 124.

If, however, I can decry the arrogation of power by the judiciary as both illegitimate and largely fruitless as a solvent for our more intractable social and economic problems, I am still at a loss to offer an articulable standard for imposing external constraints on the Justices that will not at the same time destroy their legitimate and necessary function of inhibiting at least some of the grosser forms of unconstitutional adventurism undertaken by the other two branches of the national government and by the states. And so I am left, as I shall leave you, with the words that are part of our heritage from Alexander Bickel, who was brought up in the same school as was I:

"We do not confine the judges, we caution them. That, after all, is the legacy of Felix Frankfurter's career."⁵¹